

**CENTRAL PUGET SOUND
GROWTH MANAGEMENT HEARINGS BOARD
STATE OF WASHINGTON**

In the matter of the Petition of)	
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PETER E. OVERTON)	Case No. PDR 96-3-0001
)	
for a Declaratory Ruling.)	NOTICE OF DECISION NOT TO ISSUE DECLARATORY RULING
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I. PROCEDURAL HISTORY

On January 29, 1996, the Central Puget Sound Growth Management Hearings Board (the **Board**) received a Petition for a Declaratory Ruling (the **Petition**) from Peter E. Overton (**Overton**) requesting a declaratory ruling as to whether, and under what circumstances, densities of greater than 1 dwelling unit (**du**) per ten acres can be permitted in rural lands pursuant to the Growth Management Act (**GMA** or the **Act**) and the Board’s Final Decision and Order in *Bremerton v. Kitsap County*, CPSGMHB Case No. 95-3-0039.

On February 1, 1996, the Board issued a Notice of Receipt of Petition for Declaratory Ruling (the **Notice**) asking any interested persons to submit written comments regarding the Petition.

On February 16, 1996, the “State’s Response to Petition for Declaratory Ruling” was filed with the Board as were “Comments” by Thomas F. Donnelly and “Comments of Port Blakely Tree Farms.”

On February 20, 1996, a “Memorandum of McCormick Land Company in Support of Petition for Declaratory Ruling” was filed with the Board.^[1]

On February 22, 1996, the Board received a corrected memorandum from McCormick Land Company.

II. BACKGROUND

Overton explains the problem that has necessitated the filing of the Petition:

... The problem and the uncertainty now is that Kitsap County is misinterpreting the Board's decision in the *Bremerton* case and saying that rural densities greater than 1 du/10 acre are completely prohibited by the Board's decision.... Petition, at 2 (emphasis added).

The Board entered its Final Decision and Order in *Bremerton v. Kitsap County* on October 9, 1995. The decision was subsequently appealed to Kitsap County Superior Court. That appeal is still pending. In the *Bremerton* decision, the Board said the following about rural densities:

The Board holds that the above description of rural land accurately describes the intensity and character of new residential activity and development that the Act permits in rural areas (i.e., land outside the UGA, excluding resource lands). The Board held above that a predominant pattern of 1- and 2.5-acre lots within the urban area would also constitute *sprawl*. The Board now holds that such a development pattern within the rural area would also constitute *sprawl*. Continuation of sprawl in either area violates the Act (*see* RCW 36.70A.020(2)). In addition, the Act requires a variety of rural densities within the rural area (*see* RCW 36.70A.070(5)) which will typically require a range from ten-, to 20-, 40- and 80-acre lot sizes.

The Board is aware that there are many 1- and 2.5-acre parcels throughout the region. These can be shown on a current land use map and continue with whatever rights are guaranteed by state and local law, such as the vested rights doctrine and continued use under a legal nonconforming status. However, the county's future land use map and zoning regulations may not permit the future creation of such lot sizes. **The Board now holds that, as a general rule, new 1- and 2.5-acre lots are prohibited as a residential development pattern in rural areas.** *Bremerton*, at 51 (emphasis in original).

The Board further stated:

Kitsap County has basically classified all lands outside UGAs as having either 1 du/ 2.5 acres or denser. ^[2] As the Board's general holding in Part III of this document reveals, a predominate development pattern of 1 du/1- or 2.5-acre parcels constitutes sprawl, whether it occurs in an urban growth area (a subset of which is suburban areas) or in a rural area. In effect, all of Kitsap County has been made into one giant suburban growth area which the Act prohibits. This is particularly true when many 2.5-acre parcels could potentially be developed at 1-acre densities through the PUD process. Zoning county-wide at such levels does not constitute rural densities. **Although the County may be able to have 1 du/ 2.5-acre zoning in limited areas under certain specified circumstances, the Board holds that it cannot zone the entire unincorporated area of the county outside of UGAs at such levels.**

Permitting the entire county outside the designated UGAs to be subdivided into 2.5-acre lots not only contributes to the fabulously inflated population capacity of Kitsap's Plan, it also constitutes urban growth in a rural area. **The Board holds that both the 1-acre and 2.5-acre lot sizes are an urban development pattern, not a rural one.** ^[3] **A pattern of new lots of these sizes is prohibited in rural areas.** Importantly, by classifying all lands outside UGAs in this density category, the County has violated the Plan's stated intent of "preserving" the rural character of Kitsap County. Plan, Part II, at 189. **The Board holds that this is an additional internal inconsistency in the Plan that violates RCW 36.70A.070.**

As indicated in Part III of this decision, new lot sizes in the 1- and 2.5-acre range even within urban growth areas can only be created in special, limited circumstances; they must be utilized as the rare exception (for reasons such as steep slopes or large wetland areas) rather than the general rule. When valid reasons exist for these lot sizes on an occasional site specific basis, they must be clearly articulated. More important, lots of this size should constitute only a small fraction of the lot pattern county-wide, certainly not the lion's share. When these lot sizes (too large to mow, too small to farm) become the dominant pattern, they constitute sprawl. Indeed, what the County insists on calling "suburban" is, in fact, nothing more than sprawl. *Bremerton*, at 70-71 (emphasis in original; footnotes omitted).

The *Bremerton* decision was the first of three cases involving the comprehensive plans of counties. Subsequently, the Board issued a Final Decision and Order on October 23, 1995, in *Vashon-Maury et al. v. King County*, CPSGMHB Case No. 95-3-0008, and on October 31, 1995, in *Gig Harbor et al. v. Pierce County*, CPSGMHB Case No. 95-3-0016. Each of these cases to some extent reviewed the question of appropriate rural densities permitted under the Growth Management Act.

In *Vashon-Maury*, the Board stated:

The Board has previously held that 10 acre residential lots are rural and therefore do not constitute urban growth. *See Tacoma*, at 21. The Board has held that 1- and 2.5-acre parcels constitute urban growth and are thus prohibited in a rural area. *Bremerton*, at 51. In the present case, the Board must determine whether a five-acre lot size is appropriate in a rural area. In answering this question, we must first address the more fundamental question of whether, and under what circumstances, such a lot size is allowed in a rural area. Policy R-205 applies to all of the County's rural area. Then, we turn to the matter of whether the County's policies relative to five-acre lots on Vashon Island violates the Act's direction to protect groundwater.

At first blush, a five-acre lot size appears more rural than urban in functional and visual character. It is also less likely than, for example, a 2.5 acre lot, to constitute urban growth and generate use conflicts with nearby resource lands. However, the experience in Florida suggests that five- parcels can also constitute a form of sprawl. *See Bremerton*, at 50, fn. 33. Further, the experience in Oregon indicates that, when located immediately adjacent to urban growth boundaries, five-acre parcels can foreclose the opportunity for future expansion of the UGA. *See Achen, et al., v. Clark County*, WWGMHB Case No. 95-2-0067, at 33 . Either of these outcomes would thwart fundamental objectives of the GMA.

Therefore, rather than adopt a minimum rural residential lot size, the Board instead adopts as a general rule a “bright line” at 10 acres. **The Board holds that any residential pattern of 10 acre lots, or larger, is rural.** Any smaller rural lots will be subject to increased scrutiny by the Board to assure that the pattern of such lot sizes (their number, location and configuration) does not constitute urban growth; does not present an undue threat to large scale natural resource lands, such as forest lands, and large scale critical areas, such as aquifers; will not thwart the long term flexibility to expand the UGA; and will not otherwise be inconsistent with the goals and requirements of the Act. *Vashon-Maury*, at 78-79 (emphasis in original).

In *Gig Harbor v. Pierce County*, the Board held:

The Board has addressed the subject of permitted rural densities in three prior cases. The Board held that ten-acre lots are clearly rural. *See Tacoma*, at 21. The Board held that 1- and 2.5-acre lots are urban, rather than rural, and as a new development pattern are generally prohibited in the rural area. *See Bremerton*, at 51. The Board also held that the “variety of rural densities” required by RCW 36.70A.070(5) would “typically require a range from ten-, to 20-, 40- and 80-acre lot sizes.” *Bremerton*, at 51. In *Vashon-Maury*, the Board determined that, while 5-acre lots are more rural than urban in character, it was necessary to evaluate the GMA compliance of residential lots smaller than ten acres:

... rather than adopt a minimum rural residential lot size, the Board instead adopts as a general rule a “bright line” at ten acres. The Board holds that any residential pattern of ten-acre lots, or larger, is rural. Any smaller rural lots will be subject to increased scrutiny by the Board to assure that the pattern of such lot sizes (their number, location and configuration) does not constitute urban growth; does not present an undue threat to large scale natural resource lands, such as forest lands, and large scale critical areas, such as aquifers; will not thwart the long-term flexibility to expand the UGA; and will not otherwise be inconsistent with the goals and requirements of the Act. *Vashon-Maury*, at 79. (Emphasis in original.)

Before applying the test to the present case, the Board pauses to set forth both the policy and statutory rationale for the third prong: “will not thwart the long-term flexibility to expand the UGA.”

As to the policy basis, it is important to recall that portions of Washington’s Growth Management Act borrow from the experiences in other states, most prominently Florida (as to concurrency) and Oregon (as to urban growth boundaries/areas). Since adoption of its growth management statute in 1974, Oregon has undertaken a number of studies to measure the success of its program. The Board takes official notice of *Planning the Oregon Way: A twenty-year Evaluation*, Carl Abbott, Deborah Howe and Sy Adler, Editors, Oregon State University Press, Corvallis, Oregon, 1994. Case studies of Portland, Medford, Bend and Brookings identified the problems created by a pattern of 1- to 5-acre lot sizes immediately adjacent to and outside the urban growth area boundary:

UGBs were initially designed to guide urban development to 2000. Implied in the planning and acknowledgment process is that UGBs will be expanded to accommodate growth after 2000... The trouble is that residential development in the urban fringe is resulting in a low-density residential ring around most or all of the UGB in each of the study areas. The low-density (1 - to 5-acre) development makes annexations and urban service extensions more difficult. Rural areas that might have been held in reserve for future urbanization have developed in ways that will be extremely difficult to urbanize. *Planning the Oregon Way*, at 35.

The problem with creating such a “ring” around a UGA is that it then prevents the addition of future land supply to the UGA, or, in the alternative, it forces additional urban development to “leapfrog” over the intervening ring, perpetuating many of the inherent service delivery inefficiencies and environmental consequences of sprawl.

As to the statutory basis for the third prong of the test, the Board has previously noted the Act’s predilection for compact urban development pursuant to RCW 36.70A.020 (1) and (2) and its desire that urban development be “orderly and contiguous” (*see* RCW 36.70A.210(3)(b)). While the GMA’s time horizon for the UGA land supply is twenty years (*see* RCW 36.70A.110(2)), the Act recognizes that growth will take place beyond the twenty year horizon and directs counties to be cognizant of that longer-range future.^[4] For example, the Act explicitly requires that, at least every ten years, counties are to evaluate their progress and revise their UGAs, as appropriate, to “accommodate the urban growth projected to occur in the county for the succeeding twenty-year period.” *See* RCW 36.70A.130(3). Further, the addition of the “land supply market factor” provisions of EHB 1305 (Chapter 400, Laws of 1995) underscores the legislature’s intent that counties have the flexibility to increase the UGA land supply by a reasonable amount. In view of these

provisions, the **Board holds that Act creates an *ongoing* duty for Washington’s communities to plan for future growth, including preservation of the flexibility to increase the UGA land supply at a date beyond the immediate twenty year planning horizon.**

Turning to the present case, the Board concludes that the County’s use of the Rural 5 land use designation does clearly constitute a *land use pattern* of lots smaller than 10 acres in size. As noted above, over 76,000 acres carry this designation and are located over widespread areas of the county. These facts do not mean that the County’s Plan, on its face, violates the Act - but simply that the *Vashon-Maury* test cited above will be applied.... *Gig Harbor*, at 55-56 (emphasis in original; footnotes omitted).

III. DISCUSSION

Overton attached to his Petition a copy^[5] of Kitsap County’s Board of County Commissioners’ “Alternative Land Use Plan,” dated January 8, 1996. In referring to the Alternative Land Use Plan, Overton alleges:

... On page 6, this document says that the Board has somehow ruled that 1 to 2.5 acre lots are prohibited anywhere under any circumstances in the rural area of Kitsap County.

I believe that this is a misinterpretation of the Board’s rulings and leads to uncertainty on the part of landowners like myself, the public and the County. The County has now said that it will not allow 1 du/2.5 acre lots under any circumstances in the rural areas and has said its hands are tied by the Board on this issue.... Petition, at 2-3 (emphasis added).

A press release issued by Kitsap County attached to the Alternative Land Use Plan indicates:

To facilitate public discussions and begin calculations of capital facility costs, on January 8, 1996, the Kitsap County Board of Commissioners released a draft alternative land use map.... This alternative is in no way to be construed as the only alternative available to comply with the [Board’s] Order. The Hearings Board has established a deadline of Wednesday, April 3, 1996 at 5:00 p.m. for the County to adopt a comprehensive plan, including final urban growth areas, and development regulations to implement the comprehensive plan.... Emphasis added.

No information before the Board indicates that the Alternative Land Use Plan was formally adopted by the County, nor has Overton or any person responding to Overton’s Petition so suggested. As the County’s press release suggests, the Alternative Land Use Plan is simply a draft document, intended to facilitate public discussion.

The County did take several actions in early 1996 that have been appealed to the Board, including the designation of emergency interim urban growth areas (**IUGAs**), adoption of an Interim Zoning Ordinance and Interim Zoning Map Ordinance. Notice of adoption of the these enactments was published on January 17, 1996.^[6] Pursuant to RCW 36.70A.290(2), petitions for review challenging these documents must be filed within sixty days of publication or, in this case, by March 18, 1996. To date, the Board has received five petitions for review regarding them, which have been consolidated into one case, *Hayes v. Kitsap County*, CPSGMHB Case No. 96-3-0011. The Board has not yet held a prehearing conference in this consolidated case. Therefore, it is unknown whether the question of appropriate rural densities will be formulated as a specific legal issue for the Board to determine.

WAC 242-02-910(3) is the controlling provision regarding the Board's duties on receipt of petition for a declaratory ruling. It provides:

Consideration of petition. A board shall consider the petition and within thirty days of its filing shall:

- (a) Issue a nonbinding declaratory ruling;
- (b) Notify the petitioner that no declaratory ruling is to be issued; or
- (c) Set a time and place for a hearing or for submission of written evidence on the matter, which shall occur within ninety days of the receipt of the petition, and give at least seven days notification to the petitioner of the time and place for such hearing or submission and of the issues involved.

The Board concludes that it will not issue a declaratory ruling as requested by Overton. Although the question posed by Overton is important, the Board is unable to respond to it in the context of a request for a declaratory ruling because of pending litigation. The *Bremerton* and *Vashon-Maury* decisions were appealed to superior court and remain pending. In addition, the Board's deadline in each of these cases for the respondent counties to bring their comprehensive plans into compliance has not yet passed. Furthermore, the subsequent legislative action taken by the County on an interim basis is the subject of existing appeals before the Board and may address the issues raised in Overton's Petition. A petition for declaratory ruling can be an effective tool in resolving uncertainties in the Act. However, it is inappropriate under these circumstances for the Board to answer Overton's questions. Accordingly, what the Board has held to date regarding densities in rural areas and what it might rule in future decisions will have to suffice.

So NOTed this 26th day of February, 1996.

CENTRAL PUGET SOUND GROWTH MANAGEMENT HEARINGS BOARD

M. Peter Philley
Board Member

Joseph W. Tovar, AICP
Board Member

Chris Smith Towne
Board Member

[1] The Board's Notice established February 19, 1996, as the deadline for filing comments. However, since that date was a state holiday, the Board automatically extended the deadline one additional day.

[2] This is the minimum density since greater densities are permitted through clustering or a Planned Unit Development.

[3] The County itself concedes that "... the areas of the county which are designated R-2 along the shoreline are not now rural." County's Brief, at 44.

[4] The Board has also specifically recognized that it is permissible under GMA for local governments to include in their comprehensive plans longer-range planning:

It may be wise to look beyond the GMA-mandated twenty year time horizon, in view of the fact that major capital investments, i.e. sewage treatment plants and transportation facilities such as roads, airports and rail lines, have well beyond a twenty year life and the results of certain public policy decisions will likewise endure beyond twenty years. However, the land supply and density decisions that must be made in designating UGAs must accommodate only the demands of twenty years of growth. *Kitsap v. OFM*, CPSGMHB Case No. 94-3-0012 (1995), at 23.

[5] Overton photo-copied and submitted only the odd-numbered pages of the Alternative Land Use Plan.

[6] Date of publication as listed on page 2, ¶2 of Petition for Review filed in *Kitsap Citizens for Fair Government v. Kitsap County*, CPSGMHB Case No. 96-3-0010.